United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

195

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,607

SCOTT H. BONTREE, APPELLANT

v.

STANLEY R. RESOR, SECRETARY OF THE ARMY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN T. KOTELLY,
Assistant United States Attorneys.

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ISSUE PRESENTED *

In the opinion of the appellees, the following issue is presented:

Whether the trial court properly found a basis in fact to support the Army's denial of appellant's application for discharge as a conscientious objector.

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* This case has not previously been before this Court.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellant, Private Scott H. Bortree, voluntarily enlisted in the United States Army for a period of three years, and entered active duty on March 28, 1969. Appellant had not applied for conscientious objector status prior to entry on active duty.

After completion of basic training, including training in the use of weapons, and refrigerator equipment repair school, appellant was ordered to report on October 28, 1969, to the Army Overseas Replacement Station at Fort Dix, New Jersey, to await shipment to the Republic of Viet Nam.

On the day appellant reported for duty at Fort Dix he filed a request for permission to submit an application for discharge as a conscientious objector pursuant to the provisions of Army Regulation No. 635-20 (Exhibit B).[1] This was the first notice the Army received during appellant's initial seven months of active duty of his alleged pacifistic beliefs. Appellant's orders for Viet Nam were stayed by the Army pending final determination of appellant's claim of conscientious objection. Appellant subsequently submitted his formal request for discharge on November 5, 1969, which included his statement of the basis of his conscientious objection to participation in war in any form (Exhibits A-16 through A-19) and, in addition, letters from four persons in support of his application for discharge (Exhibits A-26 through A-30).

Pursuant to Army Regulation 635-20, appellant was interviewed by Captain William W. Erbach, an Army chaplain; Captain Thomas M. Duszynski, an officer in the Army who is knowledgeable in conscientious objector matters; and Major Paul A. Buttenwieser, an Army psychiatrist. Their findings and recommendations were made a part of appellant's application (Exhibits A-21, A-23 and A-30, respectively). The application was returned by Headquarters, Department of the Army, because the hearing officer, Captain Duszynski, was an officer in appellant's chain of command contrary to Army regulation. Appellant was subsequently interviewed by Captain H. J. Witko, and his recommendation and findings were made a part of the application (Exhibit A-41). In addition, a second statement by Chaplain Erbach and a statement by Chaplain Lawrence Gibbons were also made a part of the record (Exhibits A-37 and A-40).

The application, the recommendation and remarks of appellant's unit commanding officer, Captain Kenneth S. Nadwodny (Exhibit A-15), and the recommendations and

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[1] The exhibits referred to in appellees' brief are attached to appellees' return and answer to the rule to show cause, filed in the District Court and included in the record on appeal.

remarks of the commanding officers in the chain of command between appellant's unit commander and the Adjutant General formed the record upon which Headquarters, Department of the Army, based its decision on appellant's application.

On April 20, 1970, appellant's application for discharge was disapproved, based on the finding of the Department of the Army Class 1-O Conscientious Objector Review Board that appellant "is not opposed to participation in war in any form" (Exhibit A-2). Appellant was notified of the Army's decision, and he departed, as ordered, for duty in Viet Nam on May 6, 1970.

While assigned to overseas duty, appellant, by his attorney, filed a petition for a writ of habeas corpus in the District Court in which he alleged that his detention in the Army was illegal in that the Army unlawfully denied his application for discharge. On May 15, 1970, the same day the petition was filed, the Honorable Matthew F. McGuire issued an order directing appellees to show cause why the writ should not be issued. Appellees filed their return and answer to the rule to show cause on June 1, 1970, in which they moved to dismiss the petition on the ground that appellant was not entitled to relief. On June 15, 1970, the Honorable Edward M. Curran heard oral argument on the rule to show cause and took the matter under advisement. Chief Judge Curran filed a written opinion on September 4, 1970, in which he made findings of fact and conclusions of law in favor of appellees and ordered that the rule to show cause be discharged and the petition dismissed.

Appellant subsequently filed a notice of appeal. Thereafter he filed in this Court a motion for summary reversal or for leave to proceed on the briefs and the record of the District Court as expeditiously as possible. On October 6, 1970, this Court denied appellant's motion for summary reversal, ordered that the case be considered on the original record without the necessity of an appendix, and further ordered an expedited appeal.

ARGUMENT

I. The Army properly denied appellant's application for discharge under Army Regulation 635-20.

On April 20, 1970, by order of the Secretary of the Army, appellant's application for discharge by reason of his alleged conscientious objection was denied on the ground that appellant "is not opposed to participation in war in any form" (Exhibit A-2). Appellees submit that the record clearly supports the Army's findings that appellant's application is based upon his objection to the United States military involvement in Viet Nam, and that his conscientious objection is not based upon his objection to participation in all wars. The record further reflects that appellant does not sincerely and truly hold his professed beliefs.

It has long been recognized that exemption from military service is not required by the Constitution but is a matter of legislative grace. *United States* v. *Macintosh*, 283 U.S. 589 (1931). *See also In re Summers*, 325 U.S. 561, 573 (1945); *Hamilton* v. *Regents*, 293 U.S. 245 (1934). Congress, however, since the founding of our nation has provided for the exemption from military service of persons conscientiously opposed to war. *United States* v. *Seeger*, 380 U.S. 163, 169-73 (1965). Under section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456 (j), Congress presently exempts from "combatant training and service in the armed forces" any person found by his local board to be "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form."

While the provision quoted above has direct application only to claims asserted prior to induction, post-induction claims of conscientious objection to war in any form, arising out of beliefs which crystallized subsequent to entry on active duty, are recognized by the armed forces as a basis for discharge from remaining military obligations. See Department of Defense Directive 1300.6 (May 10, 1968). However, both Congress and the armed forces

have only extended the privilege of exemption to persons who were total pacifists; *i.e.*, persons opposed to all forms of war. This view is clearly expressed in Department of Defense Directive 1300.6, which declares:

> IV A. *National Policy* . . . [t]he Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (1-O classification) shall not be inducted into the Armed Forces . . . .
>
> IV B. *DOD Policy.* Consistent with this national policy, bona fide conscientious objection . . . by persons who are members of the armed forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized.

In conformance with this policy, the Army has declared:

> Requests for discharge after entering military service will not be accepted when . . . [b]ased on objection to a particular war.

Army Regulation 635-20, para. 3.b (4).

It is therefore clear that both pre-induction and in-service exemptions for conscientious objection are inapplicable to "selective" conscientious objectors; *i.e.*, persons not opposed to war in general. *United States* v. *Gillette*, 420 F.2d 298 (2d Cir.), *cert. granted*, 399 U.S. 925 (1970); *Negre* v. *Larsen*, 418 F.2d 908 (9th Cir. 1969), *cert. granted*, 399 U.S. 925 (1970); *United States* v. *Curry*, 410 F.2d 1297 (1st Cir. 1969); *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943). As the court stated in *United States* v. *Curry*, *supra* 410 F.2d at 1299:

> The hard fact . . . is that the Congress has decided that the litmus test which must be passed by those who would secure the legal status of "conscientious objector," and correspondingly invoke the limited exercise of national self restraint toward those who disagree with national policy, is that of religiously motivated opposition to all "war in any form."

In the present case, the Army Class 1-O Conscientious Objector Review Board found that appellant's opposition was only against the war in Viet Nam. This determination must be upheld if there is a "basis in fact" to support it. *United States ex rel. Sheldon* v. *O'Malley*, 137 U.S. App. D.C. 141, 420 F.2d 1344 (1969). Appellees submit that the opinion of the Review Board (Exhibit A-3) clearly constitutes a basis in fact to support the Army's finding.

The record reflects the extensive comments by Chaplain Erbach that appellant's application for discharge was based solely on his opposition to the war in Viet Nam, and that his objection related to his direct support of the Army's combat mission by virtue of his duty assignment to Viet Nam. The chaplain states:

> This whole question of Private Bortree's discharge from the service is rather an awkward situation. He volunteered for service motivated by two things. First, a patriotic responsibility to his country, which is commendable, and second, a desire to get a job that was as non-combatant as possible in keeping with his personal attitude toward killing. Both of these were accomplished, and as a refrigeration mechanic the chances of his even being in a situation where he will carry a weapon is remote. However, a new dimension was added. Now he feels that any participation by him in the combat zone would mean he would be directly supporting the killing that is going on and this is contrary to his belief. He admitted that he was supporting the war thru payment of taxes, that he would be willing to serve in other areas of the world but not in Vietnam. I deduct from this that he would support the military mission from a remote standpoint but personal involvement would be out of the question. (Exhibit A-21.)

In a subsequent statement by Chaplain Erbach in response to a letter by appellant's attorney, the Chaplain reiterated his opinion that appellant's request for discharge was solely motivated by his orders for duty in Viet Nam. The Chaplain's opinion, in part, was based on the following conversation with appellant:

ERBACH: Well, how about if you were still in the States or if you were to go to Germany even, would you serve your time out then?

BORTREE: Well, I don't know, I suppose that I wouldn't have been faced with this decision.

ERBACH: But what if war was to break out in Germany while you were there?

BORTREE: There isn't any there now.

ERBACH: I know that but if you were there when it did?

BORTREE: I don't know, I guess I'd have to face that then. (Exhibit A-37).

The Chaplain concludes: "From this conversation *and other inferences* I got the feeling that this lad would serve but not in Viet Nam." *Id.* (Emphasis added.) The other inferences referred to by the chaplain were that there is nothing in appellant's religious background to warrant his opposition to all wars, the fact that he volunteered and did not request a discharge until after his orders for Viet Nam, the fact that his expressed beliefs did not appear to be his own, and appellant's candid admission to the Army psychiatrist that "he was pushed to this decision [application for discharge] by virtue of getting orders to Viet Nam, feeling this might necessitate his killing another person" (Exhibit A-32). The opinion of Chaplain Erbach was also fully corroborated by Chaplain Gibbons, who was present at the two interviews of appellant by Chaplain Erbach (Exhibit A-40).

In addition, the Army Review Board relied on the statement of Captain Kenneth Nadwodny, appellant's unit commander, who concluded that appellant's fear of going to a combat zone provoked his application much more than his religious beliefs did (Exhibit A-15).

Appellees further submit that the record supports a finding that appellant does not sincerely hold his professed beliefs. Although the Army expressed its basis of denial on the ground that appellant "is not opposed to participation in war in any form", a reading of the opinion of the Review Board also supports the conclusion of insincerity.

As the Supreme Court stated in *Witmer* v. *United States*, 348 U.S. 375, 381 (1955): "[The] ultimate question in conscientious objector cases is the sincerity of the [applicant] in objecting on religious grounds, to participation in war in any form." There is clearly a causal relationship between the finding of insincerity and the Army's conclusion that appellant is not opposed to war in any form. *See Speer* v. *Hedrick*, 419 F.2d 804 (9th Cir. 1969). Unlike the case of *United States ex rel. Sheldon* v. *O'Malley*, *supra*, where the Army conceded that the applicant was sincere, this case clearly raises the question of appellant's sincerity. It is appellees' contention, therefore, that this Court is not precluded from reviewing this issue.

The issue of sincerity of appellant's claimed religious beliefs is purely a subjective question. However, any objective fact which rationally casts doubt on the appellant's claim that he cannot conscientiously serve in the Army will support the Army's denial of appellant's discharge. *Witmer* v. *United States*, *supra*. In the present case Captain Witko, the hearing officer, found appellant sincere in his beliefs (Exhibit A-41). However, Chaplain Erbach, who also interviewed appellant, clearly arrived at an opposite view. In the chaplain's second statement in the record he states:

> I feel all the more strongly at this point about an observation I made in that November statement [Exhibit A-21] and since I am responding to Mr. Sanford Kahn Esq., legal representative of Pvt Bortree, I would call his particular attention to paragraph 4: "Many of the thoughts on this subject [conscientious objection] are not his own but have been prompted by circumstances and by external association." By the latter I meant people he had been counselled by outside of the military and his own family. (Exhibit A-38).

In the same statement the chaplain further observes:

> His [appellant's] response to CPT Duzynski sounds strangely reminiscent of parts of the conversations I had with him as to where he was weak in his

> statements and commitment. It would appear that he had learned from his first confrontation what wording is more acceptable than others.

Appellees invite the Court's attention to the fact that appellant's first interview was with Chaplain Erbach. The chaplain's later observation clearly supports the inference that appellant modified his beliefs when expressed to the two hearing officers, Captain Duzynski and Witko, who subsequently found him sincere. The chaplain had an opportunity to observe appellant in person and was entitled to draw conclusions from appellant's demeanor as he presented his views. *Gruca* v. *Secretary of the Army*, D.C. Cir. No. 23,840, decided October 23, 1970. Also, the fact that appellant altered his statement of beliefs in opposition to all wars would support an inference of insincerity. *Witmer* v. *United States*, *supra*, 348 U.S. at 382-383.

In addition to the remarks of Chaplain Erbach quoted above, there are additional objective facts to support a finding of insincerity. Appellant's beliefs were of recent origin since his religious principles had not precluded him from voluntarily enlisting in the Army. *See Gruca* v. *Secretary of the Army*, *supra*, slip op. at 12. Appellant did not raise his conscientious beliefs until after receiving his orders for Viet Nam. Such a belated request for discharge after receiving orders for duty in a combat zone also rationally casts doubt on appellant's claimed sincerity. *Speer* v. *Hedrick*, *supra*, 419 F.2d at 806; *Application of Coryell*, 307 F. Supp. 209, 212 (N.D. Cal. 1969); *United States ex rel. Scott* v. *Tillson*, 304 F. Supp. 406, 410 (S.D. Ga. 1969). Although the timing of his application for conscientious objector discharge is not necessarily sufficient in and of itself to cast doubt upon appellant's sincerity, it is clearly a factor which may be considered in assessing the genuineness of appellant's professed beliefs. See also *Gresham* v. *Franklin*, —— F. Supp. ——, 3 SSLR 3206 (N.D. Cal. 1970); *Shirer* v. *Hackel*, —— F. Supp. ——, 3 SSLR 3211 (N. D. Cal. 1970). Finally, appellant has not given any prior public expression to his

views or participated in any religious or humanistic activities (Exhibit A-18). As the Supreme Court held in *Witmer* v. *United States*, *supra*, 348 U.S. at 383, an applicant's failure to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war, when viewed with other facts in the record, supports a finding of insincerity.

Appellees submit that these facts in the record before the Army Review Board support the conclusion that appellant's objection is against the Viet Nam war and not truly against all wars. This conclusion is validly based on appellant's professed views, his prior behavior and his demeanor, even though appellant currently denies the beliefs ascribed to him. It is apparent from the record that appellant is not a person whose conscience, "spurred by deeply held moral, ethical, or religious beliefs, would give [him] no rest or peace if [he] allowed [himself] to become a part of an instrument of war." *Welsh* v. *United States*, 398 U.S. 333, 344 (1970).

Appellees therefore submit that the District Court properly found that there was a basis in fact to support the Army's determination that appellant is not entitled to recognition as a conscientious objector as described in Army Regulation 635-20, and that appellant is not entitled to a discharge from military duty.

II. Appellant cannot presently attack the constitutionality of Army Regulation 635-20.

Appellant's second contention is that if there is a basis in fact to support the Army's finding that appellant is not conscientiously opposed to all wars, then the Army and Department of Defense regulations pertaining to conscientious objectors are unconstitutional because they discriminate against a religious objector to a particular war.

Appellant's application for discharge was based on his alleged conscientious beliefs against participation in all wars. Appellant did not claim at any time that he was a selective conscientious objector. Appellees submit that

appellant cannot raise this issue for the first time on appeal.[2] There is no basis in the record to determine the factual question of whether appellant is a sincere "selective" conscientious objector. Nor has appellant claimed that his moral, ethical or religious beliefs require him to oppose participation in certain wars but not all wars. Therefore, appellant is not entitled to review of his constitutional claim since he cannot show that he comes within the claimed class of selective conscientious objectors. *See United States* v. *Raines*, 362 U.S. 17, 21 (1960).

CONCLUSION

WHEREFORE, appellees respectfully submit that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN T. KOTELLY,
Assistant United States Attorneys.

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[2] We note that the Supreme Court granted certiorari on June 29, 1970 in the *Gillette* and *Negre* cases, *supra*, which raise the issue of whether a selective conscientious objector has a right to exemption from military service.

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BRIEF FOR APPELLEEE

UNITED STATES COURT OF APPEALS
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v.

STANELY R. RESOR,
SECRETARY OF THE ARMY, ET AL., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney.

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JOHN T. KOTELLY,
Assistant United States Attorneys.

H.C. No. 65-70

I N D E X

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ISSUE PRESENTED *

In the opinion of the appellees, the following issue is presented:

Whether the court below properly found a basis in fact to support the Army's denial of appellant's application for discharge as a conscientious objector.

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* This case was previously before this Court on appellant's motion for summary reversal which was denied on October 6, 1970.

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COUNTERSTATEMENT OF THE CASE

The appellant, Private Scott H. Bortree, voluntarily enlisted in the United States Army for a period of three years, and entered active duty on March 28, 1969. Appellant had not applied for conscientious objector status prior to entry on active duty.

After completion of basic training, including training in the use of weapons, and refrigerator equipment repair school, appellant was ordered to report on October 28, 1969 to the Army Overseas Replacement Station at Fort Dix, New Jersey to await shipment to the Republic of Viet Nam.

On the day appellant reported for duty at Fort Dix he filed a request for permission to submit an application for discharge as a conscientious objector pursuant to the provisions of Army Regulation No. 635-20. (Exhibit B) 1/ This was the first notice the Army received during appellant's initial seven months of active duty of his alleged pacifistic beliefs. Appellant's orders for Viet Nam were stayed by the Army pending final determination of appellant's claim of conscientious objection. Appellant subsequently submitted his formal request for discharge on November 5, 1969, which included his statement of the basis of his conscientious objection to participation in war in any form (Exhibit A-16 through A-19), and, in addition, letters from four persons in support of his application for discharge. (Exhibit A-26 through A-30).

Pursuant to Army Regulation 635-20, appellant was interviewed by Captain William W. Erbach, an Army chaplain; Captain Thomas M. Duszynski, an officer in the Army who is knowledgeable in conscientious objector matters; and Major Paul A. Butterwieser, an Army psychiatrist, and their findings and recommendations were made a part of appellant's

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1/ The exhibits referred to in appellees' brief are attached to appellees' return and answer to the rule to show cause in the court below.

application (Exhibit A-21, A-23 and A-30 respectively). The application was returned by Headquarters, Department of the Army, because the hearing officer, Captain Duszynski, was an officer in appellant's chain of command contrary to army regulation. Appellant was subsequently interviewed by Captain H. J. Witko, and his recommendation and findings were made a part of the application (Exhibit A-41). In addition, a second statement by Chaplain Erbach and a statement by Chaplain Lawrence Gibbons were also made a part of the record (Exhibit A-37 and A-40).

The application, the recommendation and remarks of appellant's unit commanding officer, Captain Kenneth S. Nadwodny (Exhibit A-15), and the recommendations and remarks of the commanding officers in the chain of command between appellant's unit commander and the Adjutant General formed the record upon which Headquarters, Department of the Army, based its decision on appellant's application.

On April 20, 1970, appellant's application for discharge was disapproved based on the finding of the Department of the Army Class 1-O Conscientious Objector Review Board that appellant "is not opposed to participation in war in any form." (Exhibit A-2). Appellant was notified of the

Army's decision, and he departed, as ordered, for duty in Viet Nam on May 6, 1970.

While assigned to overseas duty, appellant, by his attorney, filed a petition for a writ of habeas corpus in the District Court below in which he alleged that his detention in the Army is illegal in that the Army unlawfully denied his application for discharge. On May 15, 1970, the same day the petition was filed, the Honorable Matthew F. McGuire issued an order directing appellees to show cause why the writ should not be issued.

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Appellant subsequently filed a Notice of Appeal and a motion for summary reversal or for leave to proceed on the briefs and the record of the District Court as expeditiously as possible. On October 6, 1970, this Court (Circuit Judges

Wright and Wilkey, in Chambers) denied appellant's motion for summary reversal, ordered that the case be considered on the original record without the necessity of an appendix, and further ordered an expedited appeal. (No. 24,607)

ARGUMENT

I. The Army properly denied appellant's application for discharge under Army regulation 635-20.

On April 20, 1970, by order of the Secretary of the Army, appellant's application for discharge by reason of his alleged conscientious objection was denied on the ground that appellant "is not opposed to participation in war in any form." (Exhibit A-2). Appellees submit that the record clearly supports the Army's findings that appellant's application is based upon his objection to the United States' military involvement in Viet Nam, and that his conscientious objection is not based upon his objection to participation in all wars. The record further reflects that appellant does not sincerely and truly hold his professed beliefs.

It has long been recognized that exemption from military service is not required by the constitution, but is a matter of legislative grace. United States v. Macintosh, 283 U.S. 589 (1931). See also In re Summers, 325 U.S. 561, 573 (1945);

Hamilton v. Regents, 293 U.S. 245 (1934). However, Congress, since the founding of our nation, has provided for the exemption from military service of persons conscientiously opposed to war. United States v. Seeger, 380 U.S. 163, 169-73 (1965). Under Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. 456(j), Congress presently exempts from "combatant training and service in the armed forces" any person found by his local board to be "by reason of religious training and belief * * * conscientiously opposed to participation in war in any form."

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> IV A. National Policy . . . [t]he Congress . . . has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (1-0 classification) shall not be inducted into the Armed Forces . . . .
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In conformance with the above policy, the Army declared that:

> Requests for discharge after entering military service will not be accepted when . . . [b]ased on objection to a particular war.

Army Regulation 635-20, para. 3.b.(4).

It is therefore clear that pre-inductions and in-service exemptions for conscientious objection are inapplicable to "selective" conscientious objectors; i.e., persons not opposed to war in general. United States v. Gillette, 420 F.2d 298 (2d Cir. 1970); Negre v. Larsen, 418 F.2d 908 (9th Cir. 1969); United States v. Curry, 410 F.2d 1297 (1st Cir. 1969); United States v. Kauten, 133 F.2d 703 (2d Cir. 1943). As the court stated in United States v. Curry, supra at 1299:

> The hard fact . . . is that the Congress has decided that the litmus test which must be passed by those who would secure the legal status of "conscientious objector," and correspondingly invoke the limited exercise of national self restraint toward those who disagree with national policy, is that of religiously motivated opposition to all "war in any form."

In the present case, the Army Class 1-O Conscientious Objector Review Board found that appellant's opposition was only against the war in Viet Nam. This determination must be upheld if there is a "basis in fact" to support it. United States ex rel. Sheldon v. O'Malley, 420 F.2d 1344 (D.C. Cir. 1969). Appellees submit that the opinion of the Review Board (Exhibit A-3) clearly constitutes a basis in fact to support the Army's finding.

The record reflects the extensive comments by Chaplain Erbach that appellant's application for discharge was based solely on his opposition to the war in Viet Nam, and that his objection related to his direct support of the Army's combat mission by virtue of his duty assignment to Viet Nam. The Chaplain states:

> This whole question of Private Bortree's discharge from the service is rather an awkward situation. He volunteered for service motivated by two things: First, a patriotic responsibility to his country, which is commendable, and second, a desire to get a job

> that was as non-combatant as possible in keeping with his personal attitude toward killing. Both of these were accomplished, and as a refrigeration mechanic the chances of his even being in a situation where he will carry a weapon is remote. However, a new dimension was added. Now he feels that any participation by him in the combat zone would mean he would be directly supporting the killing that is going on and this is contrary to his belief. He admitted that he was supporting the war thru payment of taxes, that he would be willing to service in other areas of the world but not in Vietnam. I deduct from this that he would support the military mission from a remote standpoint but personal involvement would be out of the question.

(Exhibit A-21).

In a subsequent statement by Chaplain Erbach in response to a letter by appellant's attorney, the Chaplain reiterated his opinion that appellant's request for discharge was solely motivated by his orders for duty in Viet Nam. The Chaplain's opinion, in part, was based on the following conversation with appellant:

> Erbach: Well, how about if you were still in the States or if you were to go to Germany even, would you serve your time out then?
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> Bortree: Well, I don't know, I suppose that I wouldn't have been faced with this decision.
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> Erbach: But what if war was to break out in Germany while you were there?
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> Bortree: There isn't any there now.
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> Erbach: I know that but if you were there when it did?

Bortree: I don't know, I guess I'd have to face that then.

(Exhibit A-37). The Chaplain concludes: "From this conversation and other inferences I got the feeling that this lad would serve but not in Viet Nam." Id. (Emphasis added.) The other inferences referred to by the Chaplain were that there is nothing in appellant's religious background to warrant his opposition to all wars, the fact that he volunteered and did not request a discharge until after his orders for Viet Nam, the fact that his expressed beliefs did not appear to be his own, and appellant's candid admission to the Army psychiatrist that "he was pushed to this decision [application for discharge] by virtue of getting orders to Viet Nam, feeling this might necessitate his killing another person." (Exhibit A-32).

The opinion of Chaplain Erbach was also fully corroborated by Chaplain Gibbons who was present at the two interviews of appellant by Chaplain Erbach. (Exhibit A-40).

In addition, the Army Review Board relied on the statement of Captain Kenneth Nadwodny, appellant's unit commander, who concluded that appellant's fear of going to a combat zone provoked his application much more than his religious beliefs did. (Exhibit A-15).

Appellees further submit that the record supports a finding that appellant does not sincerely hold his professed beliefs. Although the Army expressed its basis of denial on the ground that appellant "is not opposed to participation in war in any form," a reading of the opinion of the Review Board also supports the conclusion of insincerity. As the Supreme Court stated in Witmer v. United States, 348U.S. 375, 381 (1955):"[The] ultimate question in conscientious objector cases is the sincerity of the [applicant] in objecting on religious grounds, to participation in war in any form." There is clearly a causel relationship between the finding of insincerity and the Army's conclusion that appellant is not opposed to war in any form. See Speer v. Hedrick, 419 F.2d 804 (9th Cir. 1969). Unlike the case of United States ex rel. Sheldon v. O'Malley, 420 F.2d 1344 (1969), where the Army conceded that the applicant was sincere, this case clearly raises the question of appellant's sincerity. It is appellees contention, therefore, that this Court is not precluded from reviewing this issue.

The issue of sincerity of appellant's claimed religious beliefs is purely a subjective question. However, any objective fact which rationally casts doubt on the appellant's claim that he cannot conscientiously serve in the Army will

support the Army's denial of appellant's discharge. Witmer v. United States, supra.

In the present case, Captain Witko, the hearing officer, found appellant sincere in his beliefs. (Exhibit A-41). However, Chaplain Erbach who also interviewed appellant clearly arrived at an opposite view. In the Chaplain's second statement in the record he states:

> I feel all the more strongly at this point about an observation I made in that November statement [Exhibit A-21] and since I am responding to Mr. Sanford Kahn Esq, legal representative of Pvt Bortree, I would call his particular attention to paragraph 4: "Many of the thoughts on this subject [conscientious objection] are not his own but have been prompted by circumstances and by external association". By the latter I meant people he had been counselled by outside of the military and his own family.

(Exhibit A-38). In the same statement the Chaplain futher observes:

> His [appellant] response to CPT Duzynski sounds strangely remeniscent of parts of the conversations I had with him as to where he was weak in his statements and commitment. It would appear that he had learned from his first confrontation what wording is more acceptable than others.

Appellees wish to invite the Court's attention to the fact that appellant's first interview was with Chaplain Erbach. The Chaplain's later observation clearly supports the inference that appellant modified his beliefs when

expressed to the two hearing officers, Captains Duzynski and Witko, who subsequently found him sincere. The Chaplain had an opportunity to observe appellant in person and was entitled to draw conclusions from appellant's demeanor as he presented his views. Gruca v. Secretary of the Army, ___ F.2d ___ (D.C. Cir. decided October 23, 1970)(No. 23,840). Also, the fact that appellant altered his statement of beliefs in opposition to all wars would support an inference of insincerity. Witmer v. United States, 348 U.S. 375, 382-83 (1955).

In addition to the above remarks by Chaplain Erbach, there are additional objective facts to support a finding of insincerity. Appellant's beliefs were of recent origin since his religious principles had not precluded him from voluntarily enlisting in the Army. See Gruca v. Secretary of the Army, supra, slip op. at 12. Appellant did not raise his conscientious beliefs until after receiving his orders for Viet Nam. Such a belated request for discharge after receiving orders for duty in a combat zone also rationally casts doubt on appellant's claimed sincerity. Speer v. Hedrick, 419 F.2d 804, 806 (9th Cir. 1969); Application of Coryell, 307 F. Supp. 209, 212 (N.D. Cal. 1969);

United States ex rel. Scott v. Tillson, 304 F. Supp. 406, 410 (S.D. Ga. 1969). Although the timing of an application for conscientious objector discharge is not necessarily sufficient in and of itself to cast doubt upon appellant's sincerity, it is clearly a factor which may be considered in assessing the genuineness of appellant's professed beliefs. See also Gresham v. Franklin, ___ F. Supp. ___, 3 SSLR 3206 (N.D. Cal. 1970); Shirer v. Hackel, ___ F. Supp. ___, 3 SSLR 3211 (N.D. Cal. 1970). Finally, appellant has not given any prior public expression to his views or participated in any religious or humanistic activities (Exhibit A-18). As the Supreme Court held in Witmer v. United States, supra at 383, an applicant's failure to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war, when viewed with other facts in the record, support a finding of insincerity.

Appellee's submit that the above stated facts in the record before the Army Review Board support the conclusion that appellant's objection is against the Viet Nam war, and not truly against all wars. This conclusion is validly based on appellant's professed views, his prior behavior and his demeanor, even though appellant currently denies the beliefs ascribed to him. It is apparent from the record that appellant is not a person whose conscience, "spurred

by deeply held moral, ethical, or religious beliefs, would give [him] no rest or peace if [he] allowed [himself] to become a part of an instrument of war." Welsh v. United States, 398 U.S. 333, 344 (1970).

Appellees therefore submit that the court below properly found that there was a basis in fact to support the Army's determination that appellant is not entitled to recognition as a conscientious objector as described in Army Regulation 635-20, and that appellant is not entitled to a discharge from military duty.

II. Appellant cannot presently attack the constitutionality of Army Regulation 635-20.

Appellant's second contention is that if there is a basis in fact to support the Army's finding that appellant is not conscientiously opposed to allwars, then the Army and Department of Defense regulations pertaining to conscientious objectors are unconstitutional because they discriminate against a religious objector to a particular war (Appellant's brief at p. 22.)

Appellant's application for discharge was based on his alleged conscientious beliefs against participation in all wars. Appellant did not claim at any time that he was

a selective conscientious objector.

Appellees submit that appellant cannot raise this issue for the first time on appeal.[2/] There is no basis in the record to determine the factual question of whether appellant is a sincere "selective" conscientious objector. Nor has appellant claimed that his moral, ethical or religious beliefs require him to oppose participation in certain wars but not all wars. Therefore, appellant is not entitled to review of his constitutional claim since he cannot show that he comes within the claimed class of selective conscientious objectors. See United States v. Raines, 362 U.S. 17, 21 (1960).

CONCLUSION

Wherefore, appellees respectfully request that the judgment of the District Court be affirmed.

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2/ We note that the Supreme Court granted certiorari on June 29, 1970 in the cases of Gillette v. United States (No. 25) and Negre v. Larsen (No. 325) which raise the issue of whether a selective conscientious objector has a right to exemption from military service.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 24,607

SCOTT H. BORTREE, Appellant,

v.

STANLEY R. RESOR,
SECRETARY OF THE ARMY, ET AL., Appellees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 2nd day of November, 1970, served a copy of the printed brief for appellees in the above-captioned case by official United States mail to counsel for appellant addressed as follows:

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